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Supreme Court of New York, Seventh District.

NATHANIEL R. PORTER *vs.* JOHN MOUNT AND HARRIET MOUNT.

A statute authorizing a party who has paid usurious interest for the loan of money, to sue for the recovery of the excess within one year from such payment, is *cumulative*, and does not take away the right of the borrower to recover such excess in an action at common law.

A provision in such statute, that if the party paying usury shall not bring his action within one year, another person (such as a superintendent of the poor) may then sue for and recover the amount paid for usury within three years after such first year, does not *absolutely* suspend the right of action of the party paying the usury, but he may still sue at any time before suit actually brought by such public officer.

Dictum of SPENCER, C. J., in *Wheaton vs. Hibbard*, 20 Johns. 290, overruled.

A married woman having, under the laws of New York, power to make and enforce contracts in relation to the loan of money belonging to her separate estate, is therefore liable in an action for taking usurious interest, in the same manner as other usurers, and judgment may be given against her separate estate as if she were sole.

R. L. Dorr, for plaintiff.

Bemis and *Stevens*, for defendants.

The facts of the case sufficiently appear in the opinion of the court, which was delivered by

JAMES C. SMITH, J.—This is an action to recover money alleged to have been received by the defendants as excessive and unlawful interest for the loan and forbearance of money. The first question presented is whether the action is barred by the special statutory limitation existing in this state in respect to certain actions of this nature. The plaintiff is undoubtedly correct in his position that the statute (1 R. S. 772, § 3, Act of 1787, 1 R. L. 64) which authorizes the party paying usurious interest for the loan and forbearance of money to sue for and recover the excess within *one year* next after such payment, is cumulative, and does not take away the common law remedy of the borrower, to recover such excess in an action for that purpose. It was so held by the Supreme Court in *Wheaton vs. Hibbard*, 20 Johns. 290, under the Act of 1787, which was substantially the same as our present

statute in respect to this question: *Schroepfel vs. Corning*, 2 Selden 107, per PAIGE, J., 115, and FOOT, J., 118. But our statute, which was taken from that of 12 Anne, ch. 16, contains a further provision which was not in the English statute, that if the person paying usury shall not bring his suit within the year, and prosecute it to effect, then the excess so paid may be sued for and recovered, with costs, at any time within three years after the said one year, by any overseer of the town or by any superintendent of the poor of the county in which the payment may have been made (§ 4). The Statute of 1787 contained a similar provision, allowing *any other* person to prosecute within *one* year next after the year allowed to the borrower; and in view of that provision, Justice SPENCER, delivering the opinion of the court in *Wheaton vs. Hibbard*, *supra*, said: "The injured party cannot have both remedies, and if he neglects to pursue the statute remedy for more than a year, his right of action at common law would be *suspended* during the second year, for, peradventure, a third person may prosecute." If this construction is correct, it follows that on the 24th day of March 1862, when this suit was commenced, the plaintiff's right of action in respect to the interest paid on the 1st day of April 1858 and the 5th of November 1859, was suspended by the provision of our present statute, which gives a right of action to the public officers named, during three years next after the one year. However, his right of action was in full force in respect to the payment made on the 15th of April 1857, because as to that the three years had expired, and the public officers had not sued, so that in any view of the case the Statute of Limitation was not a bar to the whole cause of action. But as the question in respect to the effect of the statute upon his right of action for the other payments will arise again, upon a new trial, it is proper that it should now be considered.

The remark of Judge SPENCER above referred to is *obiter dictum*; no authority is cited in its support, and with due respect for the opinion of the learned judge from whom it fell, I am inclined to think it is not wholly correct. If the borrower's right of action is suspended during the three years, either the statute con-

tinues to run in the mean time, and thus the period within which the borrower may sue is practically reduced from six years to three, or else the running of the statute is suspended with the cause of action, and thus the time in which the borrower may sue is extended from six years to nine. I think a better rule of construction is stated by Lord COKE, in *Foster's Case*, 11 Rep. 64, thus: "In all acts which are introductive of a new law, the express designation of one person is the *exclusion* of all others. * * But in many cases the designation of a new person in a later Act of Parliament shall not exclude another person who was authorized to do the *same* thing by a precedent act." And he gives the following illustration of his meaning: "It is enacted by the Statute of 8 Henry 6, ch. 16, that after office found, &c., he who finds himself grieved may within the month offer a traverse, and to take the lands and tenements to farm, and that then the chancellor, treasurer, and other officers shall let them to him to farm until, &c. And now, by the Statute 1 H. 8, 16, he has liberty by the space of three months; and afterwards the Statute of 32 H. 8, 40, gave authority to the master of the wards, with the advice of one of the council, to make a lease of the lands of a ward or of an idiot during the time they shall remain in the king's hands. Although the latter act designs another person, yet it doth not utterly take away the first; for if before any lease made by the master of the wards, the chancellor and treasurer make one according to the Statute of 8 H. 6, then the said master cannot demise it; and so if the master makes it first to another, the chancellor and treasurer cannot demise to the party grieved." The rule laid down by Lord COKE is applicable to the case in hand, as it is manifestly immaterial whether the first authority is given by a precedent *statute* or by the common law, if there are no negative words or words of exclusion in the later act. The two are to stand together as far as possible. I think, therefore, the borrower's common-law right of action is not *absolutely* suspended during the three years given to the public officers by the statute, but he may sue during that period, *provided* neither of such officers has previously sued for the *same* matter, and not otherwise. In this case it is not alleged

or proved that the officers have sued, and if the fact were so, it should have been shown affirmatively by the defendants. If these views are correct, the statute in question is not a bar to the plaintiff's action in respect to either sum paid by him.

The remaining question to be considered is whether the evidence, in any view that may properly be made of it, establishes a cause of action against the defendants. At the time of the loan and the payment of the several sums of money sought to be recovered, the defendants were husband and wife. Upon the argument before us, and also upon the trial, as I infer from the printed case, it was taken for granted that the wife had a separate legal estate, under the provisions of the Statute of 1848 and 1849, for the more effectual protection of married women; and the evidence tends to show, and if submitted to the jury would have authorized them to find, that the money loaned and the security taken therefor belonged exclusively to the wife as a part of her legal estate, and that the money taken for the forbearance was taken and received by her, and that her husband, so far as he participated in the transaction, acted for her and with her knowledge and assent. In this view of the case, I am of the opinion that the action may be maintained. There can be no doubt but under the provisions of the statute referred to, a married woman having a separate legal estate consisting of money, may lend the same, take and hold securities therefor in her own name, and sue for and enforce them at law. The power to do these things includes the ability to make all contracts incident thereto. See *Barton vs. Beer*, 35 Barbour 78. As her common law disabilities are removed to this extent, and she may enforce at law contracts in relation to the loan and forbearance of money to which she is a party, and enjoy the benefits and profits accruing from them, it would be intolerable to hold that she is exempt from the liabilities which the law imposes upon all other lenders of money. The basis of this action is an obligation on the part of the lender to refund the excess which the law implies from the nature of the transaction. The statutes referred to permit married women to engage in the business of lending money, but not to take usury,

and if they receive it, they are under the same legal obligation to restore it as other usurers. This legal obligation may be enforced against a married woman by an action *at law* under the provisions of the Statute of 1860 (Laws of 1860, p. 158, ch. 90, § 7), which was in force when this action was commenced; and as the law now stands, a judgment may be given against her separate legal estate the same as if she were sole. (Laws of 1862, p. 345, ch. 172, § 7; *Id.*, pp. 849, 850, ch. 460, § 12, 13). In this view of the case, it is no objection that the husband is joined with his wife as a defendant. Section 114 of the Code provides that when a married woman is a party, her husband *must* be joined with her, except, &c. This section is unrepealed, and the only statute modifying it when this action was brought, is that of 1860 (Laws of 1860, p. 158, ch. 90, § 7), which provides that when the suit relates to her separate property, she may sue or be sued alone. If the husband was not personally liable, the jury could have rendered a verdict accordingly, and the judgment might have been so framed as to protect his rights. I think there should be a new trial.

E. DARWIN SMITH and JOHNSON, Js., concurred.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

NEW YORK COURT OF APPEALS.¹

Corporation—Incomplete Organization—Presumption of Corporate Character as against a Subscriber to the Capital.—Where a railroad organization, attempting to organize under the general law, has filed papers having color of compliance with the statute, but so defective as to be incapable of supporting the incorporation as against the People, it may yet, as against a subscriber to its capital, be held a corporation *de facto*, upon proof of the feeblest user: *The Buffalo and Allegheny Railroad Co. vs. Cary*.

Corporation—Act of 1845 in relation to Suits against a Foreign—

¹ To appear in E. P. Smith's Reports, Vol. XII.